

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 2000 Session

G. M. C., ET AL. v. A. V. I.

Appeal from the Chancery Court for Washington County

No. 6927 Jean Anne Stanley, Judge

FILED AUGUST 23, 2000

No. E2000-00134-COA-R3-CV

The natural mother and stepfather of a three-year-old child petitioned the Chancery Court of Washington County for an order terminating the parental rights of the child's natural father, and allowing the adoption of the child by the stepfather. The Chancery Court granted the petition pursuant to Tenn. Code Ann. § 36-1-113, finding that the father exhibited a wanton disregard for the child such that it constituted abandonment as defined by Tenn. Code Ann. § 36-1-102(1)(A)(iv). On appeal, the father raises two issues: (1) whether the Chancery Court erred in finding by clear and convincing evidence that the father engaged in conduct that constituted a wanton disregard for the welfare of the subject child where there was contradictory testimony regarding the father's conduct; and (2) even assuming that the allegations regarding the father's conduct are true, whether his conduct amounts to a wanton disregard for the welfare of the child. We affirm.

Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed; case Remanded.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J. and HERSCHEL P. FRANKS, J. joined.

Clifton Corker, Johnson City, Tennessee, for the appellant, AVI.

Stephen L. Gilley, Kingsport, Tennessee, for the appellees, GMC and TDC.

OPINION

Background

This matter arises from a petition for termination of the parental rights of the natural father ("AVI" or "Father") of a three year old child ("Child"), and for adoption of the Child by his stepfather. AVI and the natural mother ("TDC" or "Mother"), were married in June, 1995 and had one child born in October, 1996. Thereafter, the parents divorced in November, 1997 at which time

TDC was awarded custody of the Child. At the time of the parents' divorce, AVI was in jail in Sullivan County on pending charges. The judgment entered by default on November 12, 1997, also provided that due to AVI's incarceration, his visitation privileges with the Child would be suspended until he became gainfully employed and began supporting the Child. The trial court further ordered TDC to provide AVI with correspondence and photographs regarding the Child.

Sometime in January, 1998, TDC posted bond for AVI who subsequently fled Tennessee for South Carolina sometime before April, 1998. AVI returned to Tennessee and was arrested and re-incarcerated in April, 1998. AVI has remained incarcerated since that date. The parents' testimony regarding the extent of contact between AVI and Child and TDC during the brief period of time that he was not imprisoned, January through April, 1998, is contradictory. AVI testified that the three people basically lived together and that he attempted to support his son during this period of time. TDC testified that AVI lived with his parents and that he only occasionally visited her and the Child, but paid no support.

At some time during the approximate three month period that AVI was out of jail, TDC left the Child with AVI's brother and his girlfriend to babysit. AVI visited the couple during this time, and the three adults drank alcohol and smoked marijuana. TDC testified that when she returned, the Child's bottle contained beer.

AVI has an extensive criminal history. He is currently serving time in prison for a number of convictions. Although the record is not clear, AVI's effective sentence appears to be twelve years in a Tennessee Department of Corrections facility, plus four years in a community-based alternative facility.¹ The proof at trial showed that AVI, who was 25 years old at the time of trial, has been out of jail for approximately 2 years since he was 16 years old. In September, 1997, AVI was sentenced to serve eight years for facilitation of aggravated burglary for an offense which occurred in February, 1996. In December, 1997, AVI was sentenced to a fourteen year prison term for seven counts of forgery, at two years for each offense which ran concurrent to each other. These offenses occurred during an approximate two week period in May, 1997. Simultaneously, AVI received concurrent sentences for two counts for failure to appear in court on April 17, 1997. Also, in May, 1998, AVI received concurrent sentences to a community-based alternative facility which totaled 11 months, 29 days for convictions for offenses which occurred on May 26, 1997, which included evading arrest; theft under \$500; possession of marijuana; and possession of cocaine.

At trial, TDC testified that she provided monthly correspondence and occasionally sent photographs regarding the Child to AVI since April, 1998, but the Child received nothing from AVI in return. TDC also testified that during their relationship, AVI exhibited violent and abusive behavior, including punching her in the stomach and threatening to kill her. TDC testified further that AVI called her from prison, stating that when he got out of prison, he would kill her and take their Child.

¹ The criminal judgments which were submitted at trial by the parties refer to other criminal case numbers for which no judgment sheet was introduced as evidence at trial, and, therefore, are not a part of the appellate record. As a result, the Father has other criminal convictions and sentences which may impact his effective sentence.

However, AVI's testimony was directly counter to that of TDC's. AVI denied making threatening remarks to TDC. AVI testified that during the short time that he was out on bond between January and April, 1998, he cared for the Child and attempted to support TDC and Child. AVI testified that since his re-incarceration, he sent handmade items and correspondence to the Child and made regular telephone calls to the Child. Still, AVI admitted that he smoked marijuana on a regular basis while he was out of prison, and that he did so when he was around the Child.

TDC remarried and on October 13, 1998, TDC, along with her new husband ("GMC" or "Stepfather"), filed this petition for the termination of AVI's parental rights and for the adoption of the Child by GMC. TDC's and GMC's testimony established that GMC is employed and is able to support TDC and Child. Moreover, GMC takes good care of the Child and loves him.

AVI also remarried, and his wife provided testimony that AVI was a good person and very loving to her child. AVI's wife also testified that AVI loved the Child very much.

In its Memorandum Opinion and separate Order, the Trial Court granted the petition to terminate AVI's parental rights, finding that AVI engaged in "conduct prior to his incarceration which exhibit[ed] a wanton disregard for the welfare of the [c]hild." The Trial Court further found that the parties' testimony regarding the issues of AVI's contact with the child between January and April, 1998, and AVI's violent behavior toward TDC was conflicting. Nonetheless, the Trial Court found that TDC was more credible. The Trial Court stated in its Memorandum Opinion as follows:

Hopefully, [AVI] has changed during his incarceration and when released will start a new and very different life. However, the Court has no hesitation in finding that his conduct prior to incarceration and his conduct during such incarceration towards TDC exhibits a wanton disregard for the welfare of [the Child].

AVI appeals this ruling.²

² The Plaintiffs did not appeal the ruling of the Trial Court regarding the petitioners' alternative grounds for termination of parental rights based upon Tenn. Code Ann. § 36-1-113(g)(6), termination of parental rights based upon the respondent's criminal sentence to a correctional or a detention facility for ten or more years. The Trial Court examined the language of the statute and in its Memorandum Opinion stated:

The Court does not find grounds under the provisions of Tennessee Code Annotated §36-1-113(g)(6) whereby parental rights may be terminated when the parent is confined in a correctional or detention facility by order of the Court as a result of a criminal act under a sentence of ten or more years... [sic] The statute seems to contemplate that a single criminal act and sentence has been committed and imposed. The Defendant in this case has a cumulative sentence of over 10 years but no individual sentence for a criminal act of 10 or more years. (emphasis in original).

As this issue is not before us on appeal, we express no opinion concerning the Trial Court's holding on this issue.

Discussion

AVI appeals and asks the Court to address the following issues:

1. Whether the Chancery Court erred in finding by clear and convincing evidence that the Defendant engaged in conduct that constituted a wanton disregard for the welfare of the subject child where there was contradictory testimony regarding Defendant's conduct.
2. Even assuming the allegations regarding Defendant's conduct are true, his conduct does not amount to a wanton disregard for the welfare of Defendant's minor child.

TDC and GMC state the issue on appeal as follows:

1. Whether the Chancery Court was correct in finding by clear and convincing evidence that the Defendant engaged in conduct that constituted a wanton disregard for the welfare of the parties' child, justifying termination of his parental rights.

Our review of the findings of fact by the Trial Court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings of fact of the Trial Court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Alexander, et al. v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). The Trial Court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997) (citing *Union Carbide Corp. v. Huddleston*, 854 S.W. 2d 87, 91 (Tenn. 1993)).

It is well-established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). "However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *In re Drinnon*, 776 S.W.2d at 97 (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). The statute, Tenn. Code Ann. § 36-1-113, sets forth the proof needed to justify the termination of parental rights as follows:

Termination of parental or guardianship rights must be based upon:

- (1) A finding by the court by clear and convincing

- evidence that the grounds for termination or parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c). The clear and convincing standard of proof required by the statute was examined by this Court in *O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995) as follows:

The “clear and convincing evidence” standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). While it is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, [455 U.S. 745, 766, 102 S.Ct. 1388, 1401, 71 L.Ed. 2d 599 (1982)]; *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987).

Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *See Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992). It should produce in the fact-finder's mind a firm belief or conviction with regard to the truth of the allegations sought to be established. *In Re Estate of Armstrong*, 859 S.W. 2d 323, 328 (Tenn. Ct. App. 1993); *Brandon v. Wright*, 838 S.W.2d [532, 536 (Tenn. Ct. App. 1992)]; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

O'Daniel v. Messier, 905 S.W.2d at 188.

AVI raises on appeal the question of whether the Plaintiffs established by clear and convincing evidence that AVI engaged in conduct that constituted a wanton disregard for the welfare of the Child where the parties' testimony was contradictory. In its Memorandum Opinion, the Trial Court acknowledged the extreme differences in the testimony and specifically found that TDC was a more credible witness than AVI. Since the trial judge has the opportunity to see first-hand the witnesses and hear their testimony, the trial judge's decisions on issues of credibility and the weight given to that testimony are given considerable deference. *Tenn-Tex Properties v. Brownell-Electro, Inc., et al.*, 778 S.W.2d 423, 425-26 (Tenn. 1989) (citing *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987)); *Tennessee Dept. of Human Serv. v. Purcell*, 955 S.W.2d 607, 609 (Tenn. Ct. App. 1997) (citing *McCaleb v. Saturn Corp.*, 910 S.W.2d 412 (Tenn. 1995)). It is apparent from the Trial Court's Memorandum Opinion that, in large part, it based its finding that AVI showed a wanton disregard for the welfare of the Child upon the testimony of the Mother. Our Supreme Court

has held that:

Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight. This is true because the trial court alone has the opportunity to observe the appearance and the demeanor of the witnesses.

Tenn-Tex Properties, 778 S.W.2d at 426 (citing *Royal Ins. Co. v. Alliance Ins. Co.*, 690 S.W.2d 541, 543 (Tenn. Ct. App. 1985)). Here, the Trial Court resolved the issue of credibility in favor of TDC.

AVI argues that where there is a conflict between the testimony of the natural parents regarding the conduct of the parent whose rights are at issue, the proof in favor of terminating parental rights cannot meet the clear and convincing standard. It is true that when deciding whether a parent's rights should be terminated for abandonment, the court is directed to "give[] benefit of every controverted fact . . ." to the natural parent whose parental rights are being terminated. *In re Gordon*, 980 S.W.2d 372, 375 (Tenn. Ct. App. 1998) (citing *Ex Parte Wolfenden*, 348 S.W.2d 751, 756 (Tenn. Ct. App. 1961)). Nevertheless, a conflict in testimony between the parties does not compel the Court to find that the petitioners did not establish their proof by clear and convincing evidence. *See In re Gordon*, 980 S.W.2d at 374-75 (holding that the trial court was correct in finding by clear and convincing evidence that the mother abandoned her child where the mother's and paternal grandmother's testimony regarding the mother's visitation of the child conflicted and where the record showed that the trial court did not find the mother credible).

As did the Trial Court, we find that the proof submitted at trial constitutes clear and convincing evidence that AVI's conduct prior to his latest incarceration was abandonment of the Child as defined by Tenn. Code Ann. § 36-1-102(1)(A)(iv), and that the Trial Court correctly held that AVI's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(1). The termination statute provides the following:

Initiation of termination of parental or guardianship rights
may be based upon any of the following grounds:

- (1) Abandonment by the parent or guardian, as defined
in § 36-1-102, has occurred

Tenn. Code Ann. § 36-1-113(g)(1). A parent or guardian may be found to have abandoned the child where:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action

or proceeding, and either has willfully failed to visit or has willfully failed to support or make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(iv).

In this matter, AVI was apprehended by the local authorities in April, 1998, and has remained incarcerated since that time. The evidence established that AVI was incarcerated at the time of the filing of the petition for termination and adoption on October 13, 1998.

AVI has been sentenced to time in prison and a community-based alternative facility for a number of criminal convictions. The record shows that AVI committed most of these criminal offenses before the Child was even a year old, including seven counts of forgery; two counts for failure to appear in court; possession of marijuana; possession of cocaine; and evading arrest. In February, 1996, approximately eight months before the Child was born, AVI committed an offense for which he received a conviction for facilitation of aggravated burglary. AVI was re-incarcerated when the Child was only one and a half years old, and he has an effective sentence of twelve years in a Tennessee Department of Corrections facility, plus four years in a community-based alternative facility.

The proof at trial established that prior to being re-incarcerated in April, 1998, AVI enjoyed only extremely brief periods of time that he was not imprisoned after the Child was born in October, 1996, but did not have much contact with the Child even during that time. In fact, AVI, sometime after bond was posted for him by TDC in January, 1998, fled Tennessee for South Carolina. While AVI was free on bond, TDC testified that he did not regularly visit TDC and the Child and did not provide any financial support.

Additionally, the Trial Court also heard evidence that AVI admittedly used marijuana on a regular basis and did so in front of the Child. Moreover, AVI exhibited violent conduct when he was with TDC, including punching her in the stomach and threatening to kill her.³ TDC also testified that she left the Child with AVI's brother and his girlfriend to babysit. During that time, AVI visited the couple, and upon TDC's return, she found beer in the Child's bottle.

Accordingly, the record in this matter contains clear and convincing evidence that prior to his re-incarceration, AVI had a long history of criminal activity, was a regular drug user and exhibited violent behavior towards the Child's Mother. This Court has held that a parent's criminal activity, substance abuse and violent conduct toward the child's mother prior to incarceration may

³ It should be noted that the Mother testified that during his most recent imprisonment, the Father called her and threatened to kill her and take the Child once he got out of prison.

constitute conduct that shows "a wanton disregard for the welfare of the child." *In re Shipley*, No. 03A01-9611-JV-00369, 1997 WL 596281, at *4-5 (Tenn. Ct. App. Sept. 29, 1997); Tenn. Code Ann. § 36-1-102(1)(A)(iv).

With respect to the issue of whether termination of AVI's parental rights is in the best interests of the Child, we look to Tenn. Code Ann. § 36-1-113(i), which states as follows:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward other children in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The evidence in this case is clear and convincing that the best interests of the Child require terminating AVI's parental rights. Given AVI's admitted regular use of marijuana; long criminal history; extensive criminal sentences; violent behavior towards TDC; and sporadic, at best, contact with the Child prior to his re-incarceration in April, 1998, the circumstances of this case meet at least four of the nine criteria set forth in Tenn. Code Ann. § 36-1-113(i). AVI has been incarcerated for most of the Child's life, and for the brief period of time that he was out of prison, AVI engaged in numerous criminal offenses immediately before the Child was born and within the first year of the Child's life. As a result, AVI, through his own criminal conduct, has not "maintained regular visitation or other contact with the child" and has not otherwise established a meaningful relationship with the Child. *See* Tenn. Code Ann. § 36-1-113(i)(3) & (4).

In addition, the proof at trial established that AVI, during the brief period of time that he was free on bond in 1998, used marijuana with his brother and girlfriend who were keeping the Child, and that the Mother found beer in the Child's bottle. AVI also violated his bond and fled Tennessee for South Carolina. This evidence clearly shows that while AVI was out of jail and while he was with his Child, he failed to make "such an adjustment of circumstance, conduct, or conditions as to make it safe and in the [C]hild's best interest to be in the home of the [Father]." *See* Tenn. Code Ann. § 36-1-113(i)(1). Moreover, AVI admitted that he regularly used marijuana while free and that he used the drug while he was with the Child. When coupled with the Father's numerous criminal offenses and his violent behavior toward TDC, the Trial Court found more than clear and convincing evidence that AVI's home was not healthy and safe, had criminal activity and that AVI's regular drug use "may render the [AVI] consistently unable to care for the child in a safe and stable manner." *See* Tenn. Code Ann. § 36-1-113(i)(7). Therefore, since the best interests of the Child would be met by the termination of AVI's parental rights, the Trial Court correctly granted the petition for termination and adoption.

CONCLUSION

The judgment of the Trial Court is affirmed, and this matter remanded for further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. Costs of this appeal are taxed to the Appellant.

D. MICHAEL SWINEY, JUDGE